No. 90-253

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1990

NATIONAL ENGINEERING
& CONTRACTING COMPANY,
PETITIONER

vs.

OCCUPATIONAL SAFETY & HEALTH
REVIEW COMMISSION
and
UNITED STATES OF AMERICA,
DEPARTMENT OF LABOR
and
ELIZABETH H. DOLE,
SECRETARY OF LABOR

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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QUESTIONS PRESENTED

1. Whether 29 U.S.C. § 653(b)(1) pre-empts the Occupational Safety and Health Administration from jurisdiction over the working conditions of an employer under contract with another federal agency which maintains, administers and enforces a comprehensive safety and health program that incorporates both its own and OSHA safety standards.

2. Whether where the United States Army Corps of Engineers has conveyed exclusive possession, use and legal responsibility over a worksite to a general contractor, the Corps lacks common authority over that site sufficient to grant consent to The Occupational Safety and Health Administration to enter and inspect it over the objections of the general contractor.

3. Whether where there exists no probable cause or initial statutory justification for the presence of an OSHA inspector at the employer's worksite, he may, over the employer's objections, conduct a warrantless inspection pursuant to the consent of a purported joint occupier of the premises.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Statutes and Regulations:

Other Authorities:

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UNITED STATES OF AMERICA, DEPARTMENT OF LABOR

and

ELIZABETH H. DOLE, SECRETARY OF LABOR

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH DISTRCT

National Engineering & Contracting Company petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App. 1a-2a) is not officially reported. The decision of the district court (App. 3a-8a) is reported at 687 F.Supp. 1219. The decision of the magistrate (App. 9a-15a) is unreported. The decision of the administrative law judge (App. 16a-29a) is summarized at 13 OSHC-BNA 1817.

JURISDICTION

The judgment of the court of appeals was entered on May 8, 1990. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254.

STATUTORY PROVISIONS INVOLVED

Pertinent provisions of the Occupational Safety and Health Act of 1970 (29 U.S.C. Sections 653(b)(1), 657 (a) and 657 (f)) are set forth in the Appendix. (30a-31a)

STATEMENT OF THE CASE

The decision below involved two consolidated cases arising out of an accident that occurred on National Engineering & Contracting Company's ["National Engineering"] worksite in Cincinnati, Ohio on October 21, 1986. The court of appeals affirmed an order of the Occupational Safety and Health Review Commission ["Review Commission"] that the Occupational Safety and Health Administration ["OSHA"] was not pre-empted from jurisdiction over National Engineering's worksite by 29 U.S.C. § 653(b)(1) and that OSHA permissibly conducted a warrantless inspection of its worksite in reliance upon consent granted to it by the United States Army Corps of Engineers. The court-of appeals also affirmed an Order of the district court which permitted OSHA to return to National Engineering's worksite in June of 1988 to conduct a further, though restricted, inspection despite the absence of probable cause, a warrant, or a warrant-equivalent authorizing such an inspection.

National Engineering is a construction company.[1] In 1986 it was the general contractor performing flood control work along the Mill Creek in Cincinnati, Ohio pursuant to a contract with the United States Army Corps of Engineers.

[1] National Engineering is not a subsidiary nor the parent of any other corporation.

["Corps"]. The Corps did not own or control the Mill Creek; rather, it had contracted with its owner to construct the flood control project. The Corps, in turn, delegated that job by contract to National Engineering. During construction, National Engineering had complete legal responsibility for all work and had exclusive possession and use of the property.

During construction, the Corps did retain a right to inspect National Engineering's work and to enforce appropriate safety rules which had been set forth in the contract. These consisted of the Corps' own safety requirements, as well as the standards issued by the Secretary of Labor at 29 CFR Part 1926 and 29 CFR Part 1910. The contract between National Engineering and the Corps, however, did not subject National Engineering to any enforcing agency other than the Corps.

The Corps' safety and health program was comprehensive. The Corps also maintained a systematic scheme for insuring compliance with safety and health standards. All contactors, such as National Engineering, submitted specific and detailed safety programs to the Corps before beginning work. These submissions included a customized hazard analysis which reviewed each anticipated hazard and the methods of prevention during all phases of construction. The Corps also required contractors to institute employee safety instruction programs, and required them to attend regular safety meetings to review work progress.

The Corps had a system to implement safety. On a daily basis, its inspectors reviewed the work to determine if it was being done safely. Furthermore, the Corps conducted periodic safety surveys with National Engineering respecting particular job activities to determine that they were being done safely. If a safety problem arose, the contractor was contacted and immediate abatement performed. Furthermore, the Corps retained the option to issue stop orders which would result in a monetary penalty to the contractor. The Corps, therefore, had every feature of a safety and health

program, both as to coverage and enforcement, that was otherwise maintained by OSHA. Furthermore, the Corps' safety program on this project was custom-tailored to the nature of the work being done.

On October 21, 1986, an accident occurred on the Mill Creek jobsite when the operator of a piece of boomed equipment inadvertently struck an overhead electric line, causing minor injuries to a bystander. On October 23, 1986, an OSHA inspector arrived at National Engineering's worksite to investigate this accident. National Engineering objected to OSHA's entry on its worksite in the absence of a warrant. OSHA gained access, however, relying upon consent given to it by the Corps. The following day, October 24, 1986, the United States Magistrate issued a stay of any further inspection by OSHA. Thereafter, on March 11, 1987, the Magistrate lifted his stay and, in his Order, granted OSHA a period of six months from that date to conclude its inspection of National Engineering's worksite based upon the Corps' consent. (App. 9a-15a).

Significantly, following the lifting of this stay, OSHA chose not to return to National Engineering's worksite to conduct a further inspection.[2] Instead, on April 20, 1987, it issued citations against National Engineering alleging that it had violated certain safety regulations. National Engineering contested these citations, and the matter was tried before a Review Commission administrative law judge. On May 3, 1988, the administrative law judge issued his decision finding fully in National Engineering's favor on the merits; i.e., that

[2] National Engineering filed objections to the Magistrate's Order with the district court. National Engineering, however, did not seek nor obtain a stay of this Order pending the resolution of these objections. Accordingly, as of September 11, 1987, the six month period permitted OSHA by the Order within which to conduct its inspection expired. Thereafter, on November 20, 1987, the district court dismissed the action since it no longer presented contentions that warranted a specific response.

the accident and surrounding circumstances of October 21, 1986 did not constitute violations of any OSHA safety regulations. However, the judge did find that OSHA was not preempted from jurisdiction over National Engineering's worksite, and that it could properly rely upon the Corps' consent for its inspection. This decision became a final order of the Review Commission.

On the very day (May 3, 1988) that the administrative law judge found that National Engineering's activities on its worksite were not conducted in violation of any OSHA safety requirements, an OSHA inspector returned to the worksite and attempted to continue his inspection, allegedly pursuant to the Magistrate's expired order of March 11, 1987. National Engineering refused entry since there existed no initial justification or probable cause for such a further inspection, and since the Magistrate's Order previously allowing an inspection had expired.

On June 2, 1988, OSHA inspectors again returned to National Engineering's worksite. Again, National Engineering objected to the inspection; however, OSHA entered the worksite in reliance upon consent given to it by the Corps. The next day, National Engineering obtained a stay of the inspection from the United States Magistrate, which stay was lifted on June 7, 1988. On June 9, 1988, National Engineering filed objections with the district court to the lifting of this stay. A hearing on the matter was held before the district court. At the hearing, OSHA admitted that its June, 1988 inspection was not pursuant to a warrant, was not pursuant to a general programmed inspection, was not pursuant to an employee complaint, and was not pursuant to any concerns of an imminently hazardous condition. Rather, OSHA confirmed that the sole reason OSHA returned in May and June of 1988 to reinspect National Engineering's worksite was because of the accident which had earlier occurred on October 21, 1986. This accident, however, had already been determined by the Review Commission not to have constituted a violation of any OSHA regulations.

Following the hearing, the district court issued an order granting OSHA access to National Engineering's worksite to conduct a plain sight inspection. The district court found that OSHA's inspection was reasonable because it was pursuant to the equivalent of a warrant; i.e., the Magistrate's Order of March 11, 1987.[3]

National Engineering appealed both the findings of the Review Commission and the district court to the Sixth Circuit. In its decision, the Sixth Circuit affirmed the June 10, 1988 Order of the district court and the May 3, 1980 decision of the administrative law judge.

[3] Subsequently, OSHA conducted this inspection and issued citations against National Engineering, which it contested. A trial was held before a Review Commission administrative law judge, who determined that some of the citations were valid. That decision is currently pending on appeal before the Court of Appeals for the Sixth Circuit in Case No. 90-3080.

ARGUMENT

1. OSHA Was Pre-Empted From Jurisdiction Over National Engineering's Worksite By Section 4(b)(1) Of the Occupational Safety And Health Act.

Section 4(b)(1) of the Occupational Safety and Health Act, 29 U.S.C. § 653(b)(1), is straight forward. Where another federal agency is already providing for the occupational safety of a group of workers, OSHA is prohibited from duplicating that effort. *Organized Migrants In The Community Action, Inc.* v. *Brennan*, 520 F.2d 1161, 1167 (D.C. Cir. 1975) ("While giving the Secretary omnibus authority to regulate occupational safety and health, Congress sought to avoid the wasteful duplication that would result where another federal agency was also providing for the occupational safety of a class of workers.") The avoidance of repetitive enforcement action by multiple federal agencies is the very purpose which underlies Section 4(b)(1) of the Act. *Donovan* v. *Texaco, Inc.*, 720 F.2d 825, 827 (5th Cir. 1983). Furthermore, Section 4(b)(1) of the Act is a proscription against an employer being subjected to the interpretations and actions of multiple regulators since this invariably leads to confusion, inconsistency, and wasteful duplication. *Organized Migrants In Community Action, Inc.* v. *Brennan*, *supra; Donovan* v. *Texaco, Inc.*, *supra;* and, *Dillingham Tug & Barge Corp.*, 10 OSHC-BNA 1859, 1862-63 (1982).

This court has not addressed the nature and scope of the Section 4(b)(1) exemption. However, lower courts have set forth an analysis which is instructive.

In order for the Section 4(b)(1) exemption to apply, the other federal agency must have actively exercised its ability to enforce standards or regulations affecting occupational safety and health. *Southern Railway Co.* v. *OSHRC*, 539, F.2d 335, (4th Cir. 1976). Moreover, the other federal agency must have directed that enforcement at the same "working conditions," whether understood in terms of the hazard or the surroundings of the workplace, which OSHA is seeking to

regulate. *Southern Pacific Transp. Co.* v. *Usery*, 539 F.2d 386, 391 (D.C. Cir. 1976). However, where the other federal agency is already enforcing safety standards for employees in a work area, OSHA is precluded from duplicating that effort by attempting to do the same thing. *Organized Migrants In Community Action, Inc.* v. *Brennan, supra; Southern Railway Co.* v. *OSHRC, supra;* and *Southern Pacific Transp. Co.* v. *Usery, supra.*

OSHA's inspection of National Engineering's worksite is a near perfect example of the situation addressed by Section 4(b)(1) of the act. Here, another federal agency (the Corps) had actually exercised its ability to enforce standards for the safety and health of employees on the worksite. The Corps had promulgated comprehensive health and safety standards which were set forth in its own safety manual, and had adopted the Secretary of Labor's standards as well. Furthermore, the Corps expressly addressed the very circumstance which the OSHA compliance officer later investigated, and which subsequently comprised OSHA's citation against National Engineering; i.e., its work being done in close proximity to overhead electrical lines.

Similarly, the Corps implemented and enforced its safety program in a pervasive manner. Prior to construction it had required National Engineering to submit a detailed hazard analysis which was custom tailored to the hazards to be found on this job. That analysis included the hazard of overhead electrical lines, and set forth specific rules designed to deal with them. Thereafter, on a monthly basis the Corps and National Engineering reviewed all safety aspects of the job, including the overhead electrical line hazard. Furthermore, the Corps and National conducted specific surveys and monitored the work being done on this site to avoid this hazard on a daily basis.

Under these circumstances, the Corps' own exercise of its authority to enforce safety and health regulations was actual, it was pervasive, and it was effective. Therefore, OSHA was

pre-empted from jurisdiction over this worksite by virtue of Section 4(b)(1) of the Act, 29 U.S.C. § 653(b)(1).

OSHA's inspection of National Engineering's worksite is also a near-perfect example of the very type of overlapping and redundant federal control programs that create waste and confusion. As noted, on a daily basis the Corps reviewed National Engineering's operations and found them to be safe. Specifically, with respect to the operation in place at the time of the accident, the Corps and National Engineering had surveyed this job before it took place and determined that the use of the equipment in the anticipated manner would not be in violation of any safety requirements, whether those set forth in the Corps' own standards or those promulgated by the Secretary of Labor.

Accordingly, in this instance, one federal agency, the Corps, which was enforcing both its own safety standards and those promulgated by the Secretary of Labor, both before and during the operation in question, assured National Engineering that the operation was safe and was not in violation of any applicable health or safety requirements. Indeed, the Corps was eventually proven correct. Although an accident happened, it was not the result of any safety violations. (App. 16a-29a). Nonetheless, after the fact, a different federal agency (OSHA) had a different opinion. OSHA did not have the benefit of the Corps' on site and ongoing inspection of the operation, it did not have previous knowledge of the worksite, and it was not even present on the day of the accident. Nonetheless, it concluded that safety regulations had been violated and issued its citation, thereby subjecting National Engineering to overlapping and redundant enforcement of its standards.

Furthermore, although National Engineering's contact with the Corps incorporated the Secretary of Labor's safety standards, this incorporation did not provide and could not provide a boot strap by which OSHA could claim that it was the "bargained-for" *enforcing* agency. Section 4(b)(1) of the

Act recognizes that the other federal agency (the Corps) retains exclusive jurisdiction over a worksite where it enforces any "standards or regulations affecting occupational safety or health." By its terms, this Section does not limit the Corps' exclusive jurisdiction to only those instances where the other federal agency was enforcing standards which it had promulgated. Rather, pre-emption can and did occur even though this federal agency was enforcing another federal agency's standards, such as those of OSHA, in addition to its own.

Section 4(b)(1) of the Act must have meaning. In fact, it means what it says. Nothing in the Act applies to working conditions where another federal agency is already enforcing safety and health standards. In this age of proliferating federal agencies with overlapping mandates, it is especially important to adhere to this restriction. Thus, this case and this statute present the court with a unique opportunity to provide solid guidance in the administrative area to all government agencies in order to prevent the type of open-ended and unbridled activities which subject citizens to redundant and wasteful action. *Cf.*, *Marshall* v. *Barlow's, Inc.*, 436 U.S. 307 (1978). Furthermore, such guidance will have an importance beyond the Occupational Safety and Health Act and will pertain directly to all government agencies.

2. The United States Army Corps of Engineers Did Not Have Common Authority To Grant OSHA Consent To Enter And Inspect National Engineering's Worksite.

OSHA twice inspected National Engineering's worksite without a warrant authorizing its entry. Rather, it relied exclusively upon consent granted to it by the Corps to tour the premises. In each instance, the inspections were found to be valid by the Review Commission and the district court on the basis that the Corps was a joint occupier of the worksite and thus had common authority to grant OSHA access.

In *United States* v. *Matlock*, 415 U.S. 164 (1974), this Court determined that:

> The consent of one who possesses common authority over premises or effects is valid as against the absent, non-consenting person with whom that authority is shared.

Id. at 170. However, in defining the contours of that joint control, this Court established that the third party who gives consent must jointly inhabit, possess and use the property for most purposes, and that a mere property interest in the property is insufficient to confer such authority.

> Common authority is, of course, not to be implied from the mere property interest a third-party has in the property. The authority which justifies the third-party consent . . . rests rather on mutual use of the property by persons generally having joint access or control for most purposes, so that it is reasonable to recognize that any of the co-inhabitants has the right to permit the inspection in his own right and that the others have assumed the risks that one of their number might permit the common area to be searched.

Id. at 171.

The Corps clearly did not have the necessary common authority to consent to OSHA's searches of National Engineering's worksite. The Corps did not own the Mill Creek, rather, it was merely retained by its owners to construct the flood control project. In turn, the Corps delegated that responsibility exclusively to National Engineering which was the general contractor. During construction, National Engineering had sole authority and responsibility for the work. The Corps retained no right to use or possess the worksite during construction, rather this remained exclusively with National Engineering. Furthermore, all supervisory activities were conducted by the general contractor, National Engineering.

Under these circumstances, the Corps did not jointly occupy or "co-inhabit" the worksite; it did not have "mutual use of the property;" and, it did not have "joint control for most purposes." *United States* v. *Matlock*, *supra*. Unlike the situation where a general contractor has sufficient common authority to consent to the search of its sub-contractors, the Corps in this case was not the general contractor on the job, nor did it have physical control or legal responsibility for the worksite. This remained exclusively with National Engineering. Furthermore, National Engineering was not absent during OSHA's inspections, rather, it was present and continuously objected to those activities. Under these circumstances, the Corps could not consent to OSHA's search. *United States* v. *Matlock*, *supra*. See also, *Stoner* v. *California*, 376 U.S. 483 (1964); *Chapman* v. *United States*, 365 U.S. 610 (1961); and *United States* v. *Jacobsen*, 466 U.S. 109 (1984).

In its decisions this Court has addressed the issue of joint control over geographic areas sufficient to allow one joint occupier to grant consent to a government official to enter and inspect. However, these decisions have been in a criminal context, and not in a civil setting involving an administrative search such as that against National Engineering. Accordingly, this case presents this Court with the opportunity to ap-

ply this doctrine to this new area of law. Furthermore, in doing so, the court has the opportunity to clarify issues remaining within this doctrine.

For example, an issue left unresolved in *United States* v. *Matlock*, *supra*, is whether a purported joint occupier's consent can remain valid where the other occupier is present and is objecting to the warrantless search. Here, National Engineering was present and was so objecting. Thus, unlike the situation in *United States* v. *Matlock*, *supra*, the objecting joint occupier was not absent, rather its views were clearly known. Furthermore, as noted, in this case the Corps specifically refrained from accepting either physical possession or legal responsibility over National Engineering's worksite during construction. Under these circumstances, National Engineering's appeal presents this Court with a novel factual circumstance for determining the nature of what constitutes joint occupancy and control sufficient to give consent in the first instance.

3. OSHA's June, 1988 Inspection Of National Engineering's Worksite Was Both Unconstitutional And Unauthorized By Statute

After losing its contention before the administrative law judge that the October 21, 1986 accident violated OSHA safety standards, OSHA returned the same day (May 3, 1988) to National Engineering's worksite to attempt to conduct another warrantless inspection. OSHA admitted that there had been no new accident, that it had no employee complaint, and that this was not a general programmed inspection. Rather, its sole reason for returning was because of the October 21, 1986 accident. That accident, however, could no longer provide an initial justification for OSHA to conduct an inspection. Therefore, its inspection was neither authorized by the Constitution or by statute.

The Fourth Amendment protects against unreasonable searches and seizures. Thus, as a general rule, all warrantless intrusions are deemed unreasonable, and this rule applies to commercial premises, as well as dwellings, during civil or criminal investigations. *Camara* v. *Municipal Court*, 387 U.S. 523 (1967); *See* v. *Seattle*, 387 U.S. 541 (1967); and *Marshall* v. *Barlow's, Inc.*, 436 U.S. 307 (1978). While there exist a limited number of exceptions which validate as reasonable and constitutional searches conducted without warrants, essential to each of these searches is the fact that the investigator was initially present at the scene in a position to conduct the warrantless search for a justifiable reason. See, *e.g.*, *Schneckloth* v. *Bustamonte*, 412 U.S. 218 (1973). That is, in each of the warrantless searches, the investigator "had a prior jusitification for an intrusion." *Coolidge* v. *New Hampshire*, 403 U.S. 443, 466 (1971). Under the Fourth Amendment guarantee, a warrantless, consensual search is only reasonable and lawful if there exists "some other legitimate reason for being present unconnected with a search directed against the accused." *Id.*, 403 U.S. at 466.

OSHA is, of course, subject to these constitutional restrictions. *Marshall* v. *Barlow's, Inc.*, *supra*. Indeed, in order to

justify an inspection OSHA must initially show either "specific evidence of an existing violation"or that "reasonable legislative or administrative standards for conducting an inspection are satisfied with respect to a particular [establishment]." *Id.* 436 U.S. at 320. OSHA is required to have such a prior justification for a warrantless search in order to prevent it from exercising an ubridled discretion as to whom to search and under what circumstances. *Id.*, 436 U.S. at 323.

In addition to this constitutional restriction, OSHA is also restricted by the Occupational Safety and Health Act to inspections premised upon one of these two types of prior justification. The Act authorizes two types of inspections: inspections pursuant to a general administrative plan (29 U.S.C. § 657(a)) and inspections pursuant to a complaint. (29 U.S.C. § 657(f)). Without one of these bases, OSHA has no statutory authority to initiate an inspection.

In the current case, OSHA had neither a constitutional nor a statutory basis for its June, 1988 inspection of National Engineering's worksite. That inspection was not pursuant to an employee complaint, nor was it pursuant to a neutral general program. Rather, OSHA's justification for returning to the worksite was limited exclusively to its reliance on the previous accident which had occurred over one and one-half years ago and which had already been determined not to have been the result of any violations of OSHA's safety standards. Accordingly, that past accident could not constitute "specific evidence of an existing violation." *Marshall* v. *Barlow's, Inc., supra*, 436 U.S. at 320. Indeed, that past, resolved event could not even constitute the basis for "a reasonable belief that a violation has been or is being committed." *West Point-Pepperell, Inc.* v. *Donovan*, 689 F.2d 590 (11th Cir. 1988). Therefore, in the absence of any constitutional or statutory justification for OSHA conducting this second inspection, the only inference which can be drawn is that OSHA was using an unbridled discretion to unfairly subject National Engineering to the inspection. This is the very type of conduct which this Court condemned in *Marshall* v. *Barlow's, Inc., supra.*

OSHA's June, 1988 inspection was not further validated by the Magistrate's Order of March 11, 1987. By its terms, that Order granted OSHA only an additional six months within which to conduct any further inspection. National Engineering did not seek a stay of this order, nor did the filing with the district court of its objections to this Order prevent OSHA from acting pursuant to it. See generally, 9 Moore's *Federal Practice*, para. 208.03 at p. 8-9; and, 11 Wright & Miller, *Federal Practice and Procedure*, sections 2904-2905.

National Engineering had rights under the Magistrate's order. The Order limited OSHA to conducting an inspection within a limited geographic area, only upon consent of the Corps, and only for the stated six months. National Engineering had a right to rely upon those restrictions. National Engineering's choice not to seek a stay of the Order did not and could not mean that it forfeited its right to rely upon the time limitation set forth in the Order. See *e.g.*, *United Properties, Inc.* v. *Emporium Department Stores, Inc.* 379 F.2d 55 (8th Cir, 1967).

On September 11, 1987, the Magistrate's Order expired. Contrary to the subsequent holding of the district court, that Order could not serve as a warrant-equivalent which authorized OSHA's June, 1988 inspection. Therefore, there existed no constitutional basis for this warrantless search. *Marshall* v. *Barlow's, Inc., supra.*

Similarly, the effective date of the Magistrate's Order could not be extended to include June of 1988, whether such extension was premised upon National Engineering's actions or not. The original basis underlying the Magistrate's Order was the October 21, 1986 accident. As of June, 1988, however, that accident had been determined not to have been the result of violations of any OSHA safety requirements. Therefore, it could no longer serve as "specific evidence of an existing violation" on National Engineering's worksite. *Marshall* v. *Barlow's, Inc., supra*, 436 U.S. at 320. For this reason also, the Magistrate's Order could not constitute a constitutionally

valid warrant-equivalent authorizing OSHA's search in this case. Indeed, based upon OSHA's own admissions that it had no new evidence of any violations on this worksite sufficient to justify its June, 1988 inspection, the only inference which could be drawn is that this inspection was the result of unbridled discretion improperly exercised by that agency. For this reason also, this Court should accept the review of this case and correct this injustice.

REASONS FOR GRANTING PETITION

1. The jurisdictional issue raised under 29 U.S.C. 653 (b)(1) has not been before this Court. This issue is of considerable importance. The Court's decision construing the meaning of this provision will have special importance for OSHA as well as for other federal agencies. It is time that there be some guidance provided to help eliminate the overlapping, duplicative and wasteful efforts of federal agencies. Where one agency already has a comprehensive, consistent and effective program in place, other federal agencies should recognize and respect that system and utilize their scarce governmental resources for other worthy purposes. This is the best way to efficiently and effectively promote the general welfare.

2. This Court has addressed issues involving consensual searches authorized by joint occupiers of a premise. However, it has not done so in the context of an administrative proceeding involving OSHA, nor in a situation where the nonconsenting joint occupier is present and is strenuously objecting to the search. Furthermore, in this case, the purported joint occupier (the Corps) did not have common authority over the premises sufficient to grant OSHA access. On this issue as well, the Court can provide the necessary clarification of the contours of what constitutes appropriate common authority sufficient to override one's constitutional rights to a reasonable search.

3. OSHA's June, 1988 inspection in this case was clearly unconstitutional. In *Marshall* v. *Barlow's, Inc.*, *supra*, this Court made clear that this agency must adhere to the Constitution; *i.e.*, it must have a valid basis for undertaking a search of a private employer. The Constitution, as well as the OSHA statutes, clearly mandate that there are only two such bases for an inspection—because there is evidence of a potential violation of the Act, or because the employer was chosen pursuant to a neutrally-derived criteria. Absolutely neither was present in this case. OSHA only returned to National

Engineering's worksite after failing to prevail in its original contentions that the first accident violated the Act. Such an exercise of unbridled discretion must be corrected.

4. It is the right thing to do. The decision below is incorrect. The court of appeals erred when it sustained the findings that OSHA was not pre-empted from exercising jurisdiction over National Engineering's worksite, that OSHA had received a valid consent from the Corps, and that OSHA could properly conduct a warrantless inspection of those premises. Only this Court can now correct those errors. In doing so, it can set clear standards for OSHA, as well as other federal agencies, to follow when they seek to conduct such inspection. Issues which arise under the Constitution are many, and judicial resources are often few; however, this case truly requires those resources and that judicial guidance.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

NOT FOR PUBLICATION

88-3612-3721

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

NATIONAL ENGINEERING &
CONTRACTING COMPANY,
Petitioner,

v.

ELIZABETH DOLE, SECRETARY OF LABOR and
OCCUPATIONAL SAFETY AND
HEALTH REVIEW COMMISSION,
Respondents.

NATIONAL ENGINEERING &
CONTRACTING COMPANY,
Plaintiff-Appellant,

v.

UNITED STATES OF AMERICA, DEPARTMENT OF
LABOR, OCCUPATIONAL SAFETY AND
HEALTH ADMINISTRATION,
Defendant-Appellee,

ON APPEAL FROM THE UNITED STATES DISTRICT
COURT FOR THE SOUTHERN DISTRICT OF OHIO.

(Filed May 8, 1990)

BEFORE: KEITH and RYAN, Circuit Judges; and CHURCHILL, Senior District Judge.*

PER CURIAM: This action arises out of an October 1986 accident at National Engineering & Contracting Company's ("National Engineering") work-site on the Mill Creek in Cincinnati, Ohio and subsequent inspections of the work-site conducted by the Occupational Safety and Health Administration ("OSHA"). National Engineering appeals from the administrative law judge's May 3, 1988 decision which held that OSHA was not preempted from exercising jurisdiction over National Engineering's work-site, and that OSHA had received valid consent from the United States Army Corps of Engineers to inspect the work-site.

National Engineering also appeals from the district court's June 10, 1988 order. In the order, the district court adopted the report and recommendation of the magistrate, and concluded that OSHA had valid consent to inspect National Engineering's work-site. Therefore, the district court allowed OSHA to execute its search warrant.

Having carefully considered the record, the briefs, and the oral arguments of the parties, we find no error by either the administrative law judge or the disrict court warranting reversal. Therefore, we AFFIRM the June 10, 1988 order of the district court, the Honorable Herman J. Weber, United States District Judge for the Southern District of Ohio, and the May 3, 1988 decision of the administrative law judge.

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* The Honorable James P. Churchill, United States Senior District Judge for the Eastern District of Michigan, sitting by designation.

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

Civil No. C-1-86-1119

NATIONAL ENGINEERING & CONTRACTING COMPANY,

Plaintiff,

v.

UNITED STATES OF AMERICA, DEPT. OF LABOR, OCCUPATIONAL SAFETY & HEALTH ADMINISTRATION,

Defendant.

ORDER
(Filed June 10, 1988)

This matter is before the Court upon plaintiff's objections to the Order of the Magistrate Lifting the Stay Granted on June 3, 1988 and Motion for a Stay (doc. no. 22). An emergency hearing on the merits of plaintiff's claims was held on June 9, 1988. Both parties have submitted proposed Findings of Fact and Conclusions of Law (doc. nos. 24 and 25).

After hearing the testimony and considering all the evidence submitted, the Court does submit herewith its Findings of Fact and Conclusions of Law in accordance with Rule 52 of the Federal Rules of Civil Procedure.

FINDINGS OF FACT

1. National Engineering and Contracting Company is a construction company which is presently performing construction work involving encasing for purposes of flood control. This worksite is known as Section 4-A.

2. At the present time, National Engineering is engaged

in a concrete pouring operation which involves emplacing concrete on the bottom of the Mill Creek. National Engineering utilizes a boom concret pump truck to perform this operation. National Engineering's current worksite encompasses an area in length of approximately two city blocks along the Mill Creek, and with a width of approximately two hundred feet.

3. On October 21, 1986, National Engineering was engaged in a concrete pouring operation on this construction job, about two thousand feet upstream from the existing area of National Engineering's pouring operation. An accident occurred when the boom of the pump truck came into contact with energized overhead lines.

4. Whenever an accident occurs, which involves a "high-hazard industry", OSHA's policy and established procedures call for a comprehensive inspection. All construction operations are identified as "high-hazard industry" because of its high injury and illness rates.

5. OSHA began a mandatory inspection of that work area and that pouring operation on October 23, 1986. Because of the litigation initiated by the plaintiff, OSHA interrupted its own inspection. The inspection did provide OSHA with sufficient information to issue citations against National Engineering on April 20, 1987 alleging violations of OSHA standards applicable to this pouring operation. Subsequently, following a trial that occurred on January 5 and 6, 1988 before the Honorable James Burroughs of the Occupational Safety and Health Review Commission, these Citations were vacated by Judge Burroughs on May 3, 1988.

6. As of April 20, 1987, OSHA had not completed its comprehensive inspection of National Engineering's pouring operation because OSHA voluntarily stayed its inspection until the case filed in the Federal District Court had been fully litigated and decided. National Engineering's complaint was dismissed in the District Court on November 20, 1987, (doc. no. 11). Plaintiff appealed, but voluntarily dismissed the appeal. The case was dismissed by the United States Court of Appeals for the Sixth Circuit on March 15, 1988 (doc. no. 14).

7. On May 3, 1988, the Occupational Safety and Health

Administration attempted to complete the comprehensive inspection of National Engineering's pouring operation which had been interrupted by the litigation of this case. The purpose for this inspection was to inspect National Engineering's concrete pouring operation as dictated by agency administrative procedures. OSHA did not seek nor obtain a new warrant for access to conduct such an inspection, but relied on the Court order. National Engineering refused OSHA access to the site.

8. OSHA obtained the consent of the U.S. Army Corps of Engineers to enter the work area to perform a "plain view" inspection. On June 2, 1988, OSHA began an inspection of National Engineering's work area, and specifically, its pouring operation.

9. Before entering National Engineering's work area on June 2, 1988, OSHA did not seek nor obtain a new warrant. OSHA's inspection of National Engineering's work area beginning on June 2, 1988 was pursuant to a general administrative plan.

10. OSHA's comprehensive inspection of National Engineering's work area has occurred on Thursday, June 2, 1988 from approximately 2:45 p.m. until 4:00 p.m.; on Friday, June 3, 1988 from approximately 8:00 a.m. until 9:15 a.m.; on Wednesday, June 8, 1988 for the full day, approximately 8:30 a.m. until 4:00 p.m.; and on Thursday, June 9, 1988 for the full day, approximately 8:30 a.m. until 4:00 p.m. During that time, OSHA has employed up to three Compliance Officers in this inspection, these being Mr. William Murphy, Mr. John Collier, and Mr. Ralph Cannon.

CONCLUSIONS OF LAW

1. Although no search warrant or other process is explicitly required by the Occupational Safety and Health Act of 1970 (29 U.S.C. § 651 *et seq.*), a search warrant or its equivalent is constitutionally necessary to conduct a *nonconsensual* OSHA inspection. See *Marshall* v. *Barlow's Inc.*, 436 U.S. 307 (1978). In this case, the equivalent of a warrant,

a Court Order (doc. no. 21) issued, after both parties had been afforded the opportunity to brief the matter. (Doc. nos. 15, 16, 17, 19 and 20).

2. A third party can consent to a search of jointly occupied property as long as the third party has "common authority" over the premises. The Corps has given valid third party consent for OSHA to conduct inspection of Section 4-A as specifically encouraged by the Supreme Court. This consensual search does not violate National's rights. *J.L. Foti Construction Co., Inc.* v. *Donovan*, 786 F. 2d 714, 717 (6th Cir. 1986) *United States* v. *Matlock*, 415 U.S. 164, 171, 94 S. Ct. 988, 993, 39 L. Ed. 2d 242 (1974); *United States* v. *Sumlin*, 567 F.2d 684 (6th Cir. 1977) *cert denied*, 435 U.S. 932, 98 S. Ct. 1507, 55 L. Ed. 2d 529 (1978).

3. In *Marshall* v. *Barlow's*, *supra*, the United States Supreme Court stated:

> Probable cause in the criminal law sense is not required. For purposes of an administrative search such as this, probable cause justifying the issuance of a warrant may be based not only on specific evidence of an existing violation but also on a showing that "reasonable legislative or administrative standards for conducting an . . . inspection are satisfied with respect to a particular [establishment]." Camara v. Municipal Court, 387 U.S. at 538, 87 S. Ct. at 1736.

Further, the occupational Safety and Health Act "authorizes two types of inspection: an inspection pursuant to a general administrative plan, 29 U.S.C. Section 657(a); and an inspection pursuant to an employee complaint, 29 U.S.C. Section 657 (f)". *Donovan* v. *A.A. Beiro Construction Co., Inc.*, 746 F.2d 894, 898 (D.C. Cir. 1984); *See* also *J.L. Foti Constr. Co.* v. *Donovan*, 786 F.2d 714, 716 (6th Cir. 1986). OSHA's inspection of National Engineering's work area was pursuant to a general administrative plan.

4. The accident which occurred on October 21, 1986 triggered the administrative policy of OSHA's requiring com-

prehensive inspection of National Engineering's present work area begun on June 2, 1988, pursuant to the Court Order.

5. The Magistrate's Order of March 11, 1987, which was subsequently affirmed by this Court, permitted OSHA to complete its inspection of National Engineering's work area within six months from the date of that order. The Court finds that the Magistrate has correctly and reasonably interpreted his own order as approved by this Court. The Magistrate has found that OSHA may inspect Section 4-A within six months of March 14, 1988, when National's appeal was dismissed before the Court of Appeals and the Order of March 11, 1987 became a final order.

6. OSHA had not completed its comprehensive investigation of National Engineering's pouring operation as of April 20, 1987 when it issued its Citation to National Engineering alleging violation of OSHA's standards. This Court will not penalize a party for voluntarily suspending its administrative procedure pending termination of litigation involving the validity of that procedure. But for the plaintiff's filing of this lawsuit, the inspection would have been completed within a short period after the accident which triggered it, pursuant to administrative procedures.

CONCLUSION

The Court finds that the inspection now being conducted is reasonable under the holding of *Marshall* because it was pursuant to an administrative standard procedure and the Court order—the equivalent of a warrant. Further there was valid consent to the "plain view" inspection now being conducted, as found by the Magistrate and approved by this Court.

The plaintiff's Motion is hereby GRANTED to the extent that OSHA shall be allowed only to complete the standard administrative "plain sight" search interrupted by the filing of this lawsuit, in that the inspection shall not exceed five days in duration and shall proceed in accordance with normal "plain sight" procedures.

The Magistrate's Order of June 7, 1988 (doc. no. 21) is AFFIRMED and adopted as the ORDER and JUDGMENT of this Court, after an evidentiary hearing on the merits.

IT IS SO ORDERED.

/s/ HERMAN J. WEBER, Judge
United States District Court

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

MAG. NO. 86-0136-J

IN THE MATTER OF INSPECTION OF:

THE CONSTRUCTION SITE AT:

SECTION 4-A OF THE MILL CREEK PROJECT,
KINGS RUN AND SPRING GROVE AVENUE,
CINCINNATI, OHIO 45232

ORDER ON MOTION TO STAY AND MOTION TO QUASH

CIVIL NO. C-1-86-1119 (W) (A)

NATIONAL ENGINEERING AND CONTRACTING COMPANY,

Plaintiff,

v.

UNITED STATES OF AMERICA, OCCUPATIONAL SAFETY AND HEALTH ADMINISTRATION,

Defendant.

REPORT AND RECOMMENDATION OF THE MAGISTRATE
(Filed March 11, 1987)

This matter is before the Court pursuant to two motions filed by National Engineering and Contracting Company (National) (Magistrate's Docket No. 86-0136-J). National filed a motion to stay execution of an administrative search war-

rant which was granted pending a hearing on October 24, 1986. National also filed a motion to quash the administrative search warrant. The Secretary of Labor filed a memorandum in opposition. National then filed a supplemental brief and a reply brief. A hearing was held on the above-listed motions on January 12, 1987.

National has also filed a declaratory action asking the Court to declare that the regulations promulgated pursuant to the Occupational Safety and Health Act of 1970, 29 U.S.C. § 651 *et seq.*, do not apply to the work National is performing at the Mill Creek Project and permanently enjoin the Occupational Safety and Health Administration (OSHA) from entering the project (Case No. C-1-86-1119). This case has been referred to the Magistrate for Report and Recommendation.

National is performing construction work at a worksite commonly known as the Mill Creek Project in Cincinnati, Ohio, pursuant to a contract with the Department of Defense, Army Corps of Engineers (Corps). National is encasing the banks of the Mill Creek with concrete for the purpose of controlling flood water and preventing erosion. On October 21, 1986 there was an occupational accident at the Mill Creek Project. A crane boom came in contact with electric power lines and several employees were injured.

On October 23, 1986 a compliance officer from OSHA came to the worksite for the purpose of conducting an investigation. The Corps gave permission for an inspection. OSHA wished to conduct a complete inspection of National's worksite, while National wished to restrict the inspection to the area of the accident. OSHA subsequently obtained a search warrant which authorized the compliance officer to inspect the entire worksite. The warrant was stayed on October 24, 1986 pending a hearing.

This case presents two issues to the Court as follows:

1) Whether a party challenging OSHA's jurisdiction must exhaust administrative remedies before seeking redress in federal court;

2) Whether section 4(b)(1) of the Occupational Safety

and Health Act of 1970 preempts OSHA's enforcement standards in this particular case because the Corps itself has published an extensive manual on safety.

The Court finds that National does not have to exhaust administrative remedies when resort to administrative procedures is futile or inadequate to prevent irreparable injury. *Baldwin Metals Company, Inc.* v. *Donovan*, 642 F.2d 768, 773 (5th Cir.), *cert. denied*, 454 U.S. 893 (1981). In addition, "if a federal court is asked to consider the validity of a warrant prior to its execution . . . exhaustion of remedies will not be appropriate, since the irreparable harm of the threatened unconstitutional search can be prevented prior to the warrant's execution." *In re Inspection of Norfolk Dredging Co.*, 783 F.2d 1526, 1529 (11th Cir. 1986), *quoting Baldwin Metals Company, Inc.* v. *Donovan*, 642 F.2d 768, 774 n.13 (5th Cir.), *cert. denied*, 454 U.S. 893 (1981) (citations omitted).

The court further finds that section 4(b)(1) does not preempt OSHA from regulating National's worksite. *Luhr Brothers, Inc.*, Rev. Com. 1977, 1977-1978 OSHD ¶ 22, 256; *Gearhart-Owen Industries, Inc.*, Rev. Com. 1975, 1974-75 OSHD ¶ 19,329, appeal denied on other issues, CA-DC 1975, 1975-1976 OSHD ¶ 20,164. *See also*, Annotation, Construction and Application of § 4(b)(1) of Occupational Safety and Health Act (29 U.S.C.S. § 653(b)(1)), 40 ALR Fed. 147, § 13 (1978).

The issues were narrowed during the course of the January 12, 1987 hearing. Pursuant to the hearing and the pleadings which have been filed the Court makes the following findings:

1) A warrant was issued on October 23, 1986, but was not used.

2) OSHA came to inspect the National worksite on October 23, 1986, and made contact with the Corps of Engineers which gave permission for an inspection of the entire worksite. National objected to the inspection of the entire Mill Creek Project.

3) The contract between National and the Corps provides

in paragraphs 55(a)(2) and (3) at page 39 that National shall—

> (2) Comply with the standards issued by the Secretary of Labor at 29 CFR Part 1926 & 29 CFR Part 1910;
> (3) Ensure that any additional measures the Contracting Officer determines to be reasonably necessary for this purpose are taken.

29 C.F.R. Part 1926 and 29 C.F.R. Part 1910 are the OSHA construction and general industry standards, promulgated to assure safe and healthful working conditions.

4) National's double exposure to both OSHA standards and the Corps' standards is not unconstitutional or improper. Furthermore, National agreed to this double exposure in its contract.

5) OSHA was able to conduct a short inspection of the worksite to which the Corps agreed. This consensual search did not violate National's rights. *J.L. Foti Construction Co., Inc.* v. *Donovan*, 786 F.2d 714, 716 (6th Cir. 1986).

National argues that the co-occupant consent rule is inapplicable when another co-occupant initially denies entry to the government and cites *People* v. *Reynolds*, 55 Cal. App. 3d 357, 127 Cal. Rept. 561, 568 (1976) in support of this proposition. *Reynolds* involved the warrantless search of a residence occupied by a husband and wife and made as a result of a consent by the wife. The California court held that the search was constitutionally reasonable and permissible. The court did note that a co-occupier cannot give a valid consent to search if the police have been advised that the absent co-occupier does not consent to such a search. *Id.* at 370. The Sixth Circuit, which is the controlling law in this district, disagrees and stated in *Foti* as follows:

> In *Sumlin* we reasoned that "[t]he rationale behind [the rule in *Matlock*] is that a joint occupant assumes the risk of his co-occupant exposing their common private areas to such a search." 567 F.2d at 688.

> Under such circumstances, "[t]here is no reasonable expectation of privacy to be protected . . . ." *Id.* The "additional fact" that the interested party has denied consent "does not increase a reasonable expectation of privacy." *Id.* See also *Beiro*, 746 F.2d at 898; *United States* v. *Baldwin*, 644 F.2d 381, 383 (5th Cir. 1981); *United States* v. *Bethea*, 598 F.2d 331 (4th Cir.), *cert. denied*, 444 U.S. 860, 100 S. Ct. 124, 62 L.Ed.2d 81 (1979); *United States* v. *Hendrix*, 595 F.2d 883, 885 (D.C. Cir. 1979). Thus, valid third-party consent requires only that the third party have "common authority" over the premises searched and that his consent be voluntary. *Sumlin*, 567 F.2d at 688.

Foti at 717. The Corps had authority over the project and had given its consent to a search.

6. Section 4(b)(1) of the Occupational Safety and Health Act of 1970 provides as follows:

> Nothing in this Act shall apply to working conditions of employees with respect to which other Federal agencies, and State agencies acting under section 274 of the Atomic Energy Act of 1954, as amended (42 U.S.C. 2021), exercise statutory authority to prescribe or enforce standards or regulations affecting occupational safety or health.

7. In order for preemption under section 4(b)(1) of the Act to occur, the exercise of statutory authority by a Federal agency must be pursuant to enabling legislation the purpose of which was to affect occupational safety and health. *Gearhart-Owen Industries, Inc.*, Rev. Com. 1975, 1974-1975 OSHD ¶ 19,329, appeal denied on other issues, CA-DC 1975, 1975-1976 OSHD ¶ 20,164.

8. The Corps has a manual entitled the U.S. Army Corps of Engineers Safety & Health Requirements Manual, EM 385-1-1. Nevertheless, the Review Commission in *Luhr Brothers, Inc.*, Rev. Com. 1977, 1977-1978 OSHD ¶ 22,256,

in a situation similar to the instant case, found that the statute upon which the Corps' authority was based was not intended to promote employee safety and health. *See* 10 U.S.C. § 3012(d); 33 U.S.C. § 701(a). The Review Commission in *Luhr* held that a subcontractor on a flood control project for the U.S. Army Corps of Engineers was subject to OSHA regulations. Following a thorough analysis, the Commission found that the purpose of the Armed Services Procurement statute, 10 U.S.C. § 3012(d) was to achieve efficient, economical and practical procurement operations, not to promote employee safety and health.

The Commission further stated that the purpose of 33 U.S.C. § 701(a) is to protect people and property endangered by floods, noting however, "that the legislation does not address the protection of contractor employees who are actually engaged in the conduct of flood control rather than sharing its benefits." *Id.* at § 22,256. The Review Commission summed up by noting that Department of Defense Instruction No. 1000.18 applies OSHA standards to defense subcontractors.

9. National relied on the case of *Daniel Construction Company*, 12 BNA OSHC 1748 (1986) for its argument on preemption. *Daniel* is distinguishable because it dealt with the Mine Safety & Health Administration Act and the Review Commission in that case found that the Mine Act was to assure safe and healthful working conditions for employees.

Luhr is the best analysis of the instant situation which this Court has found. We will therefore abide by its thorough analysis.

10. The Court finds that OSHA can inspect the worksite, section 4-A, but not the entire Mill Creek Project. Such inspection should be completed within six months of this order.

11. The Court further finds that each party shall bear its own costs.

The order staying the execution of the search warrant is lifted. The motion to quash summons is hereby declared moot.

SO ORDERED.

It is further RECOMMENDED that Civil Action No. C-1-86-1119 be DISMISSED.

/s/ J. VINCENT AUG, JR.
United States Magistrate

UNITED STATES OF AMERICA
OCCUPATIONAL SAFETY AND HEALTH
REVIEW COMMISSION
1365 Peachtree Street, N.E., Suite 240
Atlanta, Georgia 30309-3119

OSHRC Docket No. 87-750

SECRETARY OF LABOR,
Complainant,

v.

NATIONAL ENGINEERING &
CONTRACTING COMPANY,
Respondent.

(Filed May 3, 1988)

APPEARANCES:

Janice L. Thompson, Esquire, Office of the Solicitor, U.S. Department of Labor, Cleveland, Ohio, on behalf of complainant

Kent W. Seifried, Esquire, Cincinnati, Ohio, on behalf of respondent

DECISION AND ORDER

Burroughs, Judge: National Engineering & Contracting Company ("National") contests alleged serious violations of 29 C.F.R. § 1926.201(a)(3), for failure of employees directing traffic to use flags or paddles; 29 C.F.R. § 1926.201(a)(4), for failure of employees directing traffic to wear red or orange garments; and 29 C.F.R. § 1926.416(a)(3), for failure to post warning signs and inform employees of the location, hazards and protective measures needed to protect those employees working in close proximity to an energized power line. The serious citation was issued to National on April 20, 1987. It

emanated from an accident that occurred on October 21, 1986, when the boom of a concrete pump truck operated by an employee of National contacted an energized overhead power line.

National was under contract to the U.S. Army Corps of Engineers to construct a flood control project on Mill Creek in Cincinnati, Ohio (Tr. 47, 55). It was the prime contractor for section 4-A of the project which covered a one and one-half mile stretch of Mill Creek. The project required National, among other things, to widen the channel, construct flood walls, and pave side slopes (Tr. 47). Work began on section 4-A in June of 1986 (Tr. 102, 511).

The Energized Power Line Violation

On October 21, 1986, National commenced the job of pouring approximately 100 yards of concrete into a buttress footer at section 4-A of the Mill Creek project. The site of the pour was the east side of Mill Creek Bridge off of Spring Grove Avenue. The pour was accomplished by the use of a concrete pump truck. Roy Lee Cummins, a master mechanic, was assigned the task of securing the concrete pump, locating it on the site, setting it up for operation and discussing the pump and job with the operator. Cummins arrived at the site at 11:30 a.m. and positioned a Challenge concrete pump truck on the site. Shortly thereafter he was joined by Frank Perry, who was assigned as the operator, and Randy Davis, a helper who was to work on the hopper on the rear of the truck (Ex. 44, pgs. 10-13; Tr. 468).

Prior to Perry's arrival, Cummins located the pump truck so that the cab of the truck was down an incline, referred to as a ramp. The pump and its boom were located behind the cab and were sitting flat on a service road. The six outriggers on the concrete pump were extended to provide stability. The boom was folded on in its cradle. The cab was pointing toward Mill Creek. The back of the truck was pointed towards an access road off of Spring Grove Avenue. It was essential that the concrete pump truck be located where it

was in order to reach the furthermost portion of the pour. The full extension of the boom just did allow National to reach one of the corners of the pour (Tr. 474).

There were overhead energized power lines running parallel to Spring Grove Avenue (Tr. 325). The exact location of the concrete pump truck to the overhead lines is disputed. The general location of the pump truck is undisputed. The difference in location is not significant in determining the issue. The testimony of Frank Perry places the hopper on the rear of the pump closer to the lines than other witnesses. He testified at one point that if a plumb line had been dropped from the energized lines, the lines would have been approximately three feet behind the hopper on the rear of the concrete pump truck (Tr. 403). At another time he testified the distance was from three to five feet (Tr. 352-353). If Perry's observations were correct, the boom when in its cradle would have extended under the energized lines. Cummins testified that the hopper was far enough away from the lines so that the cab of the concrete trucks was under the wires when the truck backed up to the hopper (Tr. 481-482). John Stockman, a concrete truck driver, testified that the drum of his truck was under the wires (Tr. 223-224). The energized overhead wires were at a 30- to 45-degree angle to the pump (Tr. 325-326). The lines were 37 feet above ground level.[1]

After Cummins positioned the concrete pump truck and leveled it with the outriggers, he removed the boom out of the cradle and swung it off to the side. The boom had to be raised approximately a foot to clear the cradle (Tr. 476). The work to be performed required that the boom be opearted in front of the cab and away from the wires. The rotating structure of the boom was located on the truck close to the cab and approximately 20 feet from the hopper on the rear of the truck (Ex. 25).

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[1] Compliance Officer Zucchero estimated the height of the line that was struck to be 35 feet (Tr. 431, 461). Richard Meier, a safety and training supervisor for Cincinnati Gas and Electric Co., testified that the line was 37 feet above ground level. He had the line measured (Tr. 177), whereas Zucchero estimated the height. The two-foot difference is not significant.

The boom of the concrete pump was 90 feet long when fully extended; it consisted of three 30-foot sections (Ex. 25; Tr. 434). The boom, when collapsed and in its cradle, extended 6 to 10 feet from the rear of the truck (Ex. 25). The highest point of the boom in its cradle was 13 feet 6 inches (Tr. 485). Assuming the boom extended under the wires as suggested by Perry, the wires were approximately 23 feet 6 inches above the boom while it was in the cradle. Cummins removed the boom from the cradle when he set up the equipment. He estimated the boom had to be raised a foot to clear and remove it from the cradle (Tr. 476).

Perry had been operating equipment at another worksite when he was requested on October 21 to run the concrete pump at the Mill Creek project. He arrived at the site around 11:45 a.m. (Tr. 295-296, 302). When he arrived at the site, the concrete pump truck had already been positioned and set up by Cummins. The three sections of the boom were out of the cradle and over the bank away from the wires (Tr. 299). Cummins familiarized Perry with the control panel and pumped the first load of concrete (Tr. 297, 299). Perry then took over the operation of the pump truck while Cummins watched him operate it for a period of time (Tr. 299, 306). Perry acknowledged that Cummins asked him if he had been instructed on how far to operate a boom from electrical wires and that he stated that he had been instructed (Tr. 383). Perry felt he was competent to perate the equipment and felt comfortable operating it (Tr. 342-343). Prior to pouring concrete, Perry swung the boom around and across the pour to see how much angle he needed (Tr. 301, 343).

Perry pumped concrete from noon until about 4:00 p.m. on October 21 (Tr. 156, 311). After finishing a pour, normal procedure is to collapse the boom and clean out the boom pipe (Tr. 311-312). Perry swung the boom to the right so that the boom was still away from Spring Grove Avenue (Tr. 484). Cummins then told Perry to fold up the boom and clean it out (Tr. 312, 484). Perry testified that when he began to swing the boom around, he thought he swung to a position that was 12 to 15 feet from the wires (Tr. 391, 392, 398). He stated

that he was trying to watch the wires as he swung the boom around. The sun was in his eyes (Tr. 392). He knew where the lines were located (Tr. 376).

Perry testified that he had started to fold back the number two boom just in case he was too close to the wires (Tr. 392). Cummins testified that he told Perry to fold up the boom and clean it out (Tr. 484). The boom could have been folded from a position in front of the truck rather than swinging it around (Tr. 484). After telling Perry to fold up the boom, clean it out and place it in the cradle, Cummins went to the back of the pump to talk with Randy Davis (Tr. 486). According to Cummins, Perry commenced swinging and folding the boom at the same time (Tr. 486). In the process the boom struck an overhead energized line. Cummins stated that Perry swung it around contrary to his instructions (Tr. 486-487).

The Secretary alleges that National violated 29 C.F.R. § 1926.416(a)(3)[2] by failing to post warning signs and inform employees of the location hazards and protective measures needed to protect employees working in close proximity to an energized electrical distribution line. The first part of the standard requires an employer to ascertain before work is begun whether any part of an energized electric power circuit is so located that "the performance of the work may bring any person, tool, or machine into physical or electrical contact with the electric power circuit." There is no dispute that a conference was held prior to commencement of the work to determine if there was a dangerous work condition.

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[2] Section 1926.416(a)(3) states:

> (3) Before work is begun the employer shall ascertain by inquiry or direct observation, or by instruments, whether any part of an energized electric power circuit, exposed or concealed, is so located that the performance of the work may bring any person, tool, or machine into physical or electrical contact with the electric power circuit. The employer shall post and maintain proper warning signs where such a circuit exists. The employer shall advise employees of the location of such lines, the hazards involved, and the protective measures to be taken.

Prior to the pour, Daniel Vogel, job superintendent, met with representatives from the Corps of Engineers to discuss whether the power lines should be de-energized or sleeved. It was determined that the lines could not be de-energized because they were the main electrical feed to Proctor and Gamble (Tr. 103, 517-519). After discussion of the location of the lines, concrete pump and job to be performed, it was concluded that it was not necessary to sleeve the lines. The boom was to be operated only in front of the truck and away from the lines. The anticipated working conditions provided ample clearance from the lines (Tr. 103-105, 518). All the work was to be performed away from the wires (Tr. 105, 107). The boom was so located that there was no danger of contacting the wires while pumping concrete.

The contact with the overhead wire did not occur during the approximately four hours of pouring. It occurred during the folding up of the boom after all pouring had been completed. National had no reason to anticipate any problems while pouring the concrete since the boom was in a horizontal position over the cab of the concrete pump truck. There was also no reason to anticipate that the fold-up procedure would bring the boom into contact with the wires. The pivot of the boom on the concrete truck would have been located 25 to 30 feet from the wires. Perry was an experienced operator. Once the boom had been folded, it could have easily been placed in the cradle without getting closer than 20 feet to the line. The line struck by the boom was 37 feet high, whereas the boom in its cradle was only 13 feet 6 inches high.

National analyzed the work conditions prior to commencing work and concluded that the energized wires presented no hazard since the work was to be performed away from the lines. Personnel for the U.S. Corps of Engineers also were of the opinion that the lines created no potential hazard for accidental contact (Tr. 104-105, 111). There was no reason the boom had to be any closer than 20 feet to the lines, and this would have occurred only when it was being placed in its cradle. The decision to not de-energize or sleeve the line was reasonable in view of the known working conditions. Since

National's conclusion that the performance of the work would not bring any person, tool, or machine into contact with the energized lines was premised on reasonable beliefs, it was not required to post warning signs or to "advise employees of the location of such lines, the hazards involved and the protective measures to be taken."

National took reasonable steps before the commencement of the pouring operation to ensure that the boom would not be operated in close proximity to the overhead wires. The boom was to be used only in the front of the cab, in the opposite direction from the wires. There was no reason for Perry to swing the boom around before folding it. It would be unreasonable to conclude that National should have anticipated the actions of Perry. If the folding operation had been done properly, the boom would have not been near the power lines (Tr. 484). "Hazardous conduct is not preventable if it is so idiosyncratic and implausible in motive or means that conscientious experts, familiar with the industry, would not take it into account in prescribing a safety program." *National Realty & Construction Co.* v. *OSHRC*, 489 F.2d 1257, 1266 (D.C. Cir. 1973). The alleged violation of 29 C.F.R. § 1926.416(a)(3) is vacated.

The Flagging Violations

The Secretary alleges that National was in violation of § 1926.201(a)(3)[3] and § 1926.201(a)(4)[4] on October 21, 1986, for the failure of employees to use flags and paddles and to wear red or orange garments while directing traffic. The

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[3] Section 1926.201(a)(3) states:

(3) Hand signaling by flagmen shall be by use of red flags at least 18 inches square or sign paddles, and in periods of darkness, red lights.

[4] Section 1926.201(a)(4) states:

(4) Flagmen shall be provided with and shall wear a red or orange warning garment while flagging. Warning garments worn at night shall be of reflectorized material.

Secretary's case is based on the testimony of John Stockman and David Eubank. These two gentlemen were truck drivers for Hilltop Basic Resources, the supplier of concrete for the job. They made deliveries of concrete to the site on the afternoon of October 21. The drivers would pull off of Spring Grove Avenue and back up to the hopper on the concrete pump truck (Tr. 153). When they finished unloading, they would back across Spring Grove Avenue and wash out their truck (Tr. 299).

Stockman testified as follows with respect to his delivery on October 21, 1986.

> When I arrived there, if I can recall, there was a man out there with his hardhat on or off, flagging me—you know, just flagging me. To the best of my recollection, he must have been letting me know that's where he wanted me to unload everything. (Tr. 217)

Stockman stated that the flagman had a white hardhat bearing a red National Engineering emblem "if I'm not mistaken" (Tr. 220). The flagman was not using sign paddles or wearing red or orange garments (Tr. 220). The person directing the traffic was in the roadway (Tr. 221, 248). Stockman believed the person was a laborer (Tr. 244).

Eubank made two deliveries to the site on October 21, 1986 (Ex. 36; Tr. 266, 275). He testified that there was some traffic control but was uncertain if it was provided by National or an employee of a subcontractor that was working at the site at the same time. The person wore a red helmet, but Eubank noted that both companies used red helmets. Eubank thought the person came from across the street, the site of a subcontractor, to direct traffic (Tr. 274, 280). The person directing traffic used no sign paddles or red flags. He was also not wearing a red or orange garment (Tr. 274-275). In an affidavit given on October 29, 1986, Eubank stated that "[T]here was a National man (red hardhat) who went into traffic and blocked it when I backed across the street (Spring Grove Avenue) to wash up the truck" (Ex. 38). When con-

fronted with his affidavit, he testified that he assumed it was a National employee because of the red hardhat but that it could have been an employee from a subcontractor (Tr. 285-288).

Eubank and Stockman did not recognize the man they observed flagging. Both appear to have based their conclusion on the hardhat the employee was wearing. Since National and the subcontractor both wore red hardhats, according to Eubank, his identifying process is somewhat suspect. The assistance Eubank received came when he had to back across Spring Grove Avenue to wash his truck. Stockman had someone to wave him into the site (Tr. 219-220). Stockman identified the employee assisting him as wearing a white hat (Tr. 220, 241). He identified the person as a National employee because of the hardhat he was wearing (Tr. 238). He thought the hat had a National logo on it but had some doubts about the certainty of whether the helmet had a National logo on it (Tr. 241). There is a distinct possibility that Stockman did not obtain a good look at the logo since he testified that when he arrived, the person was holding the helmet in his hand and waving it to flag him (Tr. 246).

Daniel Vogel, National's superintendent at the site, testified that no National employees were assigned to do any flagging on Spring Grove Avenue on October 21. He did not consider a flagman to be necessary (Tr. 524). He did not observe anyone during the day engaging in such activity (Tr. 524). He cleared up the matter as to Stockman's and Eubank's testimony regarding the colors of the hardhats. According to him, National' suspervisory personnel wear white helmets and non-supervisory employees wear red helmets. On occasions, National provided helmets to employees of subcontractors who needed them (Tr. 525-526).

While Vogel was not on the site all the time concrete trucks were arriving and leaving, his testimony that no National employees were flagging is supported by Roy Cummins. He was in the vicinity of the concrete pump while the trucks were arriving and departing and saw no flagging by anyone (Tr. 483). The testimony of Vogel and Cummins is supported

by Gorman Berter, a construction inspector for the U.S. Army Corps of Engineers (Tr. 129). He was at the site on October 21 for most of the afternoon (Tr. 132). Berter did not recall seeing any individuals directing traffic at the site (Tr. 154, 157).

Vogel, Cummins and Berter were unequivocal in their testimony that they saw no persons engaging in a flagging operation at the site. No one was assigned by Vogel to act in that capacity since he did not consider a flagging operation was necessary. While Eubank and Stockman saw someone directing them, their testimony is too nebulous to conclude the person was an employee of National.

In order to prove a violation of section 5(a)(2) of the Occupational Safety and Health Act of 1970 ("Act"), the Secretary must show, among other elements, that the cited employer knew or could have known of the condition with the exercise of reasonable diligence. *Daniel International Corp., Wansley Project*, 81 OSAHRC 71/D6, 9 BNA OSHC 2027, 1981 CCH OSHD ¶ 21,679 (No. 76-181, 1981). Assuming *arguendo* that the individual or individuals noted by Stockman and Eubank were employees of National, there is no evidence that National was aware of the violation or that they could have known of the violation by the exercise of reasonable diligence. Since no employees had been assigned to a flagging operation, it would be unrealistic to attribute knowledge to them on the basis they failed to exercise reasonable diligence in their supervision. Vogel pointed out that National had a flagging procedure that complied with the standards. He did not consider initiating the procedure on October 21 since he was of the opinion that flagging was unnecessary. Stockman indicated the person was in the roadway for a short period of time. The alleged violations of § 1926.201(a)(3) and § 1926.201(a)(4) are vacated.

National's Preemption and Warrant Arguments

National argues that OSHA's authority to issue citations in this case was preempted by the U.S. Army Corps of Engineers

by virtue of section 4(b)(1) of the Act, 29 U.S.C. § 653(b)(1). National also argues that the Corps did not have authority to grant access to OSHA personnel to National's worksite and that the citation was not issued with reasonable promptness. These arguments are without merit. The arguments are not specifically addressed because all items of the citation have been vacated.

FINDINGS OF FACT

1. On October 23, 1986, Compliance Officer James J. Zucchero commenced an investigation of an accident occurring on October 21, 1986, at section 4-A of a job referred to as the Mill Creek project (Tr. 137-138, 260-261, 422-423). The boom of a concrete pump truck made contact with a power line (Tr. 130). The line carried 7,200 volts (Tr. 171).

2. National Engineering and Contracting Company ("National") was under contract to the U.S. Army Corps of Engineers to construct a flood control project on Mill Creek in Cincinnati, Ohio (Tr. 47, 55). It was the prime contractor on section 4-A of the project (Tr. 85, 130).

3. The contract included, among other things, channel excavation, concrete channel paving, concrete "U" wall, sheet piling, riprapping and removal and modification of bridges for approximately one and one half miles of the Mill Creek channel. The project was divided into ten sections (Ex. 1; Tr. 47, 56, 77).

4. Clause 55 of the contract between the Corps of Engineers and National provided that National shall "comply with the standards issued by the Secretary of Labor at 29 CFR Part 1926 and 29 CFR Part 1910" (Ex. 1; Tr. 53, 80).

5. On October 21, 1986, National needed to pour approximately 100 yards of concrete at a difficult location along the creek. It was decided to use a Challenge concrete pump with a 90-foot boom to pump the concrete (Exs. 16, 17; Tr. 300, 468).

6. Roy Cummins, a master mechanic for National, was assigned the taks of securing the equipment, locating it on the

site, setting it up for operation and discussing the job and operation of the pump with the operator. Frank Perry was assigned to operate the equipment (Ex. 44, pgs. 10-11; Tr. 295, 468).

7. Cummins located the concrete pump truck so that the cab of the truck was down an incline. The pump and boom were behind the cab and sitting flat on a service road. The six outriggers were extended to provide stability. The back of the truck was pointed towards Spring Grove Avenue (Tr. 470-474).

8. Overhead energized power lines ran parallel to Spring Grove Avenue. The wires were at a 30- to 45-degree angle to the pump (Tr. 325-326). The lines were 37 feet above ground level and located behind the hopper on the concrete pump truck (Tr. 177, 352-353, 403).

9. The concrete pump truck had a 90-foot boom which could be folded in three 30-foot sections (Tr. 434). The highest point of the boom in its cradle was 13 feet 6 inches (Tr. 485).

10. Prior to commencing the pour, Cummins removed the boom from the cradle by raising it a foot to clear the cradle. He then swung it around, extended it out and positioned it towards Mill Creek and away from the energized lines (Tr. 476).

11. National and the Corps of Engineers determined that it was not necessary to de-energize or sleeve the power lines behind the pump. This determination was based on the fact that the boom would be used in front of the cab, in the opposite direction of the power lines (Tr. 104-105, 111, 517, 522).

12. After Cummins pumped the first load of concrete, Perry assumed the job as operator. He pumped concrete until 4:00 p.m. At that time Cummins told Perry to fold up the boom and put it in its cradle. Perry swung the boom around as he folded it up, bringing it into contact with the power lines, resulting in an electrical shock to Perry, Cummins, Randy Davis and John Stockman, a delivery truck driver (Ex. 44, pgs. 31-33; Tr. 235, 311, 487, 490).

13. The crane could have been folded up from a position in front of the truck rather than folding and swinging at the same time (Tr. 484).

14. National held weekly safety meetings with its employees. National had a well-known rule that overhead equipment was to be kept at least 20 feet away from overhead power lines (Tr. 510, 516). Perry told Cummins he had been instructed on how far to operate a boom from electrical lines (Tr. 383).

15. Hilltop Basic Resources, Inc. ("Hilltop") delivered the concrete to section 4-A. Hilltop driver John Stockman observed a man with a white hardhat flagging him on the day of the accident. The man was not using sign paddles or wearing red or orange garments. Stockman thought there was a National logo on the hat (Tr. 217, 220).

16. Hilltop driver David Eubank observed a man with a red hardhat flagging him on the day of the accident. He was not using sign paddles or wearing red or orange garments. Eubank stated the hardhat bore an emblem that looked like the National logo on the side of the helmet (Tr. 238, 241-242).

17. No National employee was assigned to flag traffic on the day of the accident (Tr. 524). National's supervisory personnel wear white hardhats; other employees wear red hats. Both colors bear National's logo on the front of the helmet (Tr. 525-526).

18. National's superintendent, Daniel Vogel, Roy Cummins, master mechanic, and Gorman Berter, a construction inspector for the U.S. Army Corps of Engineers, did not observe anyone directing traffic on October 21, 1986, at section 4-A (Tr. 154, 157, 483, 524).

CONCLUSIONS OF LAW

1. National, at all times material to this proceeding, was engaged in a business affecting interstate commerce within the meaning of section 3(5) of the Occupational Safety and Health Act of 1970 ("Act").

2. National, at all times material to this proceeding, was

subject to the requirements of the Act and the standards promulgated thereunder. The Commission has jurisdiction of the parties and of the subject matter.

3. National was not in violation of 29 C.F.R. § 1926.416(a)(3) for failing to post warning signs and informing employees of the location, hazards, and protective measures needed to protect employees working in close proximity to an energized power line.

4. National was not in violation of 29 C.F.R. § 1926.201(a)(3) for failure of its employees directing traffic to use flags or sign paddles. It was not established that the flagmen were National's employees.

5. National was not in violation of 29 C.F.R. § 1926.201 (a)(4) for failure of its employees directing traffic to wear red or orange garments. It was not established that the flagmen were National's employees.

ORDER

Based upon the findings of fact and conclusions of law, it is

ORDERED: That the serious citation issued to National on April 20, 1987, is vacated.

/s/ JAMES D. BURROUGHS
Judge

29 USCS § 653

§ 653(b)(1) Nothing in this Act shall apply to working conditions of employees with respect to which other Federal agencies, and State agencies acting under section 274 of the Atomic Energy Act of 1954, as amended (42 USC § 2021) [42 USCS § 2021], exercise statutory authority to prescribe or enforce standards or regulations affecting occupational safety or health.

29 USCS § 657

§ 657. **Inspections, investigations, and recordkeeping**

(a) Authority of Secretary to enter, inspect, and investigate places of employment; time and manner. In order to carry out the purposes of this Act, the Secretary, upon presenting appropriate credentials to the owner, operator, or agent in charge, is authorized—

(1) to enter without delay and at reasonable times any factory, plant, establishment, construction site, or other area, workplace or environment where work is performed by an employee of an employer; and

(2) to inspect and investigate during regular working hours and at other reasonable times, and within reasonable limits and in a reasonable manner, any such place of employment and all pertinent conditions, structures, machines, apparatus, devices, equipment, and materials therein, and to question privately any such employer, owner, operator, agent or employee.

* * *

(f) Request for inspection by employees or representative of employees; grounds; procedure; determination of request; notification of Secretary or representative prior to or during any inspection of violations; procedure for review of refusal by representative of Secretary to issue citation for alleged violations. (1) Any employees or representative of employees who believe that a violation of a safety or health standard exists that threatens physical harm, or that an imminent danger exists, may request an inspection by giving notice to the

Secretary or his authorized representative of such violation or danger. Any such notice shall be reduced to writing, shall set forth with reasonable particularity the grounds for the notice, and shall be signed by the employees or representative of employees, and a copy shall be provided the employer or his agent no later than at the time of inspection, except that, upon the request of the person giving such notice, his name and the names of individual employees referred to therein shall not appear in such copy or on any record published, released, or made available pursuant to subsection (g) of this section. If upon receipt of such notification the Secretary determines there are reasonable grounds to believe that such violation or danger exists, he shall make a special inspection in accordance with the provisions of this section as soon as practicable, to determine if such violation or danger exists. If the Secretary determines there are no reasonable grounds to believe that a violation or danger exists he shall notify the employees or representative of the employees in writing of such determination.

(2) Prior to or during any inspection of a workplace, any employees or representative of employees employed in such workplace may notify the Secretary or any representative of the Secretary responsible for conducting the inspection, in writing, of any violation of this Act which they have reason to believe exists in such workplace. The Secretary shall, by regulation, establish procedures for informal review of any refusal by a representative of the Secretary to issue a citation with respect to any such alleged violation and shall furnish the employees or representative of employees requesting such review a written statement of the reasons for the Secretary's final disposition of the case.